UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In a Matter Between:	)	
	)	
GOOD SAMARITAN HOSPITAL	)	
	)	Case 31-CA-117462
Employer,	)	
and	)	
	)	
CALIFORNIA NURSES ASSOCIATION (CNA),	)	
	)	
Charging Party.	)	
	)	

BRIEF IN SUPPORT OF EXCEPTIONS BY CHARGING PARTY CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES ORGANING COMMITTEE TO DECISION OF ADMINISTRATIVE LAW JUDGE

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Charging Party California Nurses Association (hereinafter "CNA" or "Union") files this brief in support of its exceptions to the Administrative Law Judge ("ALJ") Mary Miller Cracraft's decision in the above-entitled matter pursuant to Section 102.46 of the National Labor Relations Board's (hereinafter "Board") Rules and Regulations.

I. INTRODUCTION

This case was scheduled to be tried before the Honorable Mary Miller Cracraft on November 16, 2015[1], in Los Angeles, California based on an Amended Complaint and Notice of Hearing ("Complaint"). Prior to the scheduled hearing, the ALJ considered briefs and statements of position by the General Counsel, the Union, and the Respondent pursuant to the Respondent's motion to defer to the decision of Arbitrator John Kagel. The documentary evidence on record includes the exhibits submitted in the prehearing briefs filed in support and opposition to the Respondent's motion to defer to arbitrator's decision, which explicitly states was not addressing the unfair labor practice issues in this case.[2]

The underlying Complaint alleges that Good Samaritan Hospital (hereinafter "Respondent" or "Employer") violated Section 8(a)(5) and (1) by failing and refusing to bargain collectively with the Union and by failing to continue the terms of its 2012-2015 contract with the Union when it unilaterally transferred bargaining unit work formerly performed by the newly eliminated "Charge Nurse" bargaining unit classification—representing over 8% of the bargaining unit—to a newly created, non-unit position known as "Department Supervisor." In other words, the issue of the unfair labor practice charge was whether the Respondent's unilateral change and mid-term modification of the scope of the unit without notice to the Union

[1] This case was initially set for hearing on September 16, 2015 and postponed on the request of Respondent.
[2] In this brief, "ALJD ___" refers to the Administrative Law Judge's decision; "CPX ___" refers to Exhibits submitted by the Charging Party Union in its prehearing brief to the ALJ; "RX ___" refers to Exhibits submitted by the Respondent Employer in its prehearing brief to the ALJ.

or an opportunity to bargain was lawful under the Act. Clearly, it was not. The ALJ's torture reading of the arbitration award to allow such an abrogation of the collective bargaining agreement must be reversed.

Apart from the factual issues revolving around the Respondent's unilateral decision to eliminate the "Charge Nurse" classification, the issue presented before the arbitrator was whether the method by which Respondent implemented its unilateral decision—by laying off 52 individual Charge Nurses from their jobs—was properly permitted under the layoff article of the collective bargaining agreement.

Deferral of this matter to Arbitrator John Kagel's decision of January 5, 2015 would result in the gross injustice contrary to Board law. The statutory issues in the Complaint were never presented to Arbitrator Kagel and, in his decision, he expressly stated that he was not addressing whether the mid-term change in the scope of the unit—by transferring unit work to non-unit employees—would require the Union's consent and, if his decision can somehow be read to have included that consideration, it is clearly repugnant to the purposes and policies of the Act. The existence of the unfair labor practice charge was discussed at the arbitration in order to clarify that these statutory issues were not before the arbitrator.

The ALJ erred by failing to properly evaluate whether arbitral and statutory issues are factually parallel under the Act where the two issues share a common denominator of events but have separate factual underpinnings that do not overlap. The ALJ also did not properly address whether the arbitrator was presented with facts relevant to resolve the unfair labor practice issue. Moreover, to accept the ALJ's decision to defer to arbitration would permit a party to a grievance procedure to feign accord with an arbitrator's stipulation that statutory issues will not be considered but then later take the contrary position that the statutory issues were resolved by the arbitrator. Accordingly, the ALJ erred by failing to properly evaluate this matter under the

extant post-arbitral deferral standard for 8(a)(5) cases.

Even assuming that the factual issues of the arbitration and unfair labor practice charge were parallel, which they are not, the 8(a)(5) issues in this matter implicate individual Section 7 rights and have a serious an economic impact such that deferral is improper. The conduct here abrogated the collective bargaining relationship, reducing the scope of the bargaining unit dramatically by over 8%. Additionally, the 52 Charge Nurses whose jobs were eliminated have been forced to choose whether to relinquish their right to be represented by the Union, forego their differential pay, or altogether resigning, and allowing the Respondent to effectively write a position out of the recognition clause in the parties' agreement. Accordingly, the ALJ erred by failing to adopt a new framework with respect to post-arbitral deferral of Section 8(a)(5) cases, and as set forth in detail below, the Union urges the Board to extend the *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), standard to 8(a)(5) post-arbitral deferral cases.

II. PROCEDURAL HISTORY

In response to an announcement by Respondent's on November 13, 2013, of its decision to eliminate the Charge Nurse classification, remove 52 Charge Nurses from their jobs, and transfer their work to a non-unit Department Supervisor position, the Union filed the initial unfair labor practice charge protesting failure to bargain and requesting injunctive relief on November 19, 2013. On May 29, 2014, after a careful investigation, the Region issued Complaint against the Respondent and set the hearing to commence September 15, 2014.

On June 25 and 26, 2014, arbitration began before Arbitrator John Kagel of the Union's separate grievance protesting the method by which the Respondent implemented its unilateral change as a violation of the layoff article of the parties contract, and was scheduled to continue on September 17, 2014. (ALJD 3:1-2, 4:11-13) The parties stipulated that the issue before the arbitrator was confined to the interpretation of the layoff article of the contract and that the

separate unfair labor practice charge was not before Arbitrator Kagel but were before the Board, meaning that issues concerning decisional and effects bargaining obligations were not relevant in the grievance and arbitration proceeding. (CPX 1:12; RX 5:12)

On November 14, 2014, after the arbitration hearing concluded and while the arbitrator's decision was pending, the Region made a decision to defer the case to arbitration. (CPX 8)

On January 5, 2015, Arbitrator Kagel issued a decision in which he explicitly declined to address the statutory issues in the pending unfair labor practice before the Board, and made the narrow conclusion that the Respondent's method of removing 52 nurses from their Charge Nurse jobs did not violate the layoff article of the contract. (ALJD 4:11-16)

On April 17, 2015, the Region by letter stated that it had decided to revoke its deferral to arbitration because the contractual issues presented to the arbitrator were not factually parallel to the statutory proceedings and that deferring to the award would be repugnant to the Act. (ALJD 5:5-9) After the Region issued an Amended Complaint on June 26, 2015, a hearing was set to commence before the ALJ on November 16, 2015.

On November 3, 2015, the Respondent filed a prehearing motion to defer this case to Arbitrator Kagel's decision. On November 10, 2015, the Union and the General Counsel each filed oppositions to the Respondent's motion to defer to the arbitrator's decision.

On November 11, 2015, the ALJ issued a notice of cancellation of the hearing, which stated that the Respondent's motion would be granted and that a decision would issue.

After considering whether it is appropriate to defer to the decision of an arbitrator under the standards set forth in *Olin Corp.*, 268 NLRB 573 (1984) and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the ALJ issued a decision on November 16, 2015. The ALJ in her decision deferred this matter to Arbitrator John Kagel's decision from January 15, 2015 and dismissed the Complaint.

III. STATEMENT OF THE FACTS

A. The Respondent Eliminates the Charge Nurse Classification, 52 Charge Nurse Positions, and Transfers Bargaining Unit Work Formerly Performed by Charge Nurses to a Newly Created, Non-Unit Position.

On November 13, 2013, the Respondent made a two-fold announcement to staff that it had decided to eliminate the jobs of 52 Charge Nurses, or 100 percent of the "Charge Nurse" classification of bargaining unit work, by December 15, 2013, and that a new non-bargaining unit position of "Department Supervisor" had been created. (ALJD 3:10-23). The Union alleged in its briefing on the motion to defer that the Respondent by phone and in person informed the Union that the "Department Supervisor" was being created to take on the duties of soon-to-be eliminated Charge Nurses. The Respondent at the time of the announcement offered to bargain only over the effects of this "restructuring" of the nursing department. (ALJD 3:14-16)

As set forth in the recognition clause of the parties' collective bargaining agreement, the bargaining unit includes "all full-time, regular part-time, non-benefitted full-time and per diem registered nurses, *including charge nurses*." (ALJD 2:22-24) (Emphasis added). Consistent with 8(a)(5) and (d), the Management Rights article of the parties' contract also states that "During the term of this Agreement, the Union and the Employer agree, upon request, to bargain in good faith about the following…The utilization of employees not covered by this Agreement to do work which is currently done by Nurses covered by this Agreement." (ALJD 8-9)

A separate provision of the Management Rights article, which the ALJ refers to as Article 3.19, states that Respondent "has the right to operate its business which includes the exclusive right to determine, change, discontinue, alter, or modify in whole or in part, temporarily or permanently . . . [t]he job classifications, shift schedules and content and qualifications thereof." (ALJD 4:39, n. 4; CPX 1:6-7; RX 5:6-7)

While the unfair labor practice charge was still under investigation and before the

Complaint was issued, the Respondent implemented its decision to eliminate the job classification of Charge Nurse. (ALJD 3) By March 2014, 52 employees—more than 8% of the bargaining unit—were required to apply for the newly created non-unit position, attempt to bid into other bargaining unit positions, or resign. (ALJD 3-4). Eight former Charge Nurses were hired as Department Supervisors, six Charge Nurses retired, four became break relief nurses, four took case coordinator positions, and 30 bumped into staff nurse positions. (ALJD 3-4)

B. Arbitrator Kagel Issued a Decision Limited to Interpretation of the Layoff Article of the Collective Bargaining Agreement.

On December 3, 2013, the Union filed a written grievance protesting the Respondent's contract violations when it issued layoff notices for the 52 Charge Nurses. (ALJD 2, 4:11-12) The decision of Arbitrator John Kagel issued on January 5, 2015.[3] (CPX1:1; ALJD 4)

In his decision, Arbitrator Kagel expressly stipulated that the separate NLRA charges were not before him, "Hence, issues concerning decisional and effects bargaining obligations are not relevant to this proceeding." (ALJD 4:11-13; 7:15-18) He found that there was no layoff as the number of unit jobs before and after November 13, 2013 was comparable, and he found that no permanent termination occurred. (ALJD 4:11-16) He rejected the Union's argument that the elimination of the 52 Charge Nurses was a "reduction in force" and that in the course of implementing the change the loss of jobs should have been in order of inverse seniority over the entire bargaining unit, rather than the Respondent's completely subjective process requiring Charge Nurses—most of whom possessed the highest degree of seniority in the bargaining unit—to apply for the new non-unit positions, or attempt to bump into an existing bargaining unit position, or resign. (CPX 1:13; RX 5:13) The testimony presented at arbitration centered on whether the Respondent's decision caused former Charge Nurses to accept other positions at

[3] The ALJ incorrectly states in her decision that the arbitration decision issued on January 15, 2015.

significantly lower wage rates, sometimes on inconvenient shifts that required significant adjustments in their personal lives. (CPX 1:8-12; RX 5:8-12)

Considering the Union's position that the elimination of 52 Charge Nurses was a permanent termination, Arbitrator Kagel discussed whether the Respondent had a right to no longer fill the under Article 3.19 of the Management Rights clause and found that the Respondent had reserved the right to fill or not to fill a job classification. (ALJD 6:19-27) Arbitrator Kagel did not discuss or make a finding on the separate provision of the Management Rights article regarding the utilization of employees not covered by contract to do work which is currently done by the bargaining unit. (ALJD 9:12-15)

Finally, the arbitrator made two statements regarding Department Supervisors' which are irrelevant to the resolution of the statutory issues. First, he stated as background for the arbitration:

> A new, non-unit bargaining unit position of Department Supervisor was created. Those duties included overall supervision of a department's nursing shift, including patient relations. According to the Employer, the Department Supervisors, all of whom hold RN licenses, do not personally provide clinical patient care but are not precluded from assisting in direct patient nursing care in emergencies. Such emergency nursing work is not an Agreement violation if performed by qualified non-bargaining unit personnel.

(ALJD 4:21-28) After 15 pages without mentioning Department Supervisors, the arbitrator stated that "[Department] Supervisors "perform no Bargaining Unit work *with respect to taking patient assignments*" and made no determination on whether Charge Nurses even performed these duties prior to being eliminated. (ALJD 6:39-41) (Emphasis added.) Arbitrator Kagel did not make a finding, either express or implicit, regarding whether any other bargaining unit duties formerly performed by Charge Nurses are now performed by the new non-unit Department Supervisor position.

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III. ARGUMENT

A. The ALJ Erred by Deferring to Arbitrator Kagel's Decision Under the *Olin/Spielberg* Standard. [Exceptions Nos. 1-25]

The ALJ erred by failing to find (1) that the contractual issues were not factually parallel to the statutory issues, (2) that Arbitrator Kagel was not generally presented with facts relevant to the resolving the statutory issues, and (3) that Arbitrator Kagel's decision was palpably wrong and repugnant to the Act with regard to the Complaint allegations. (ALJD 6-10) The ALJ dismissed the complaint before witnesses on the merits of the underlying statutory issues were presented and before a hearing commenced. (ALJD 10)

Under the Board's deferral standard, deferral is appropriate in 8(a)(5) cases when: (1) the arbitration proceedings must have been fair and regular; (2) all parties must have agreed to be bound; (3) the arbitral decision must not be clearly repugnant to the Act; (4) the contractual issue before the arbitrator must be factually parallel to the unfair labor practice issue; and (5) the arbitrator must have been presented generally with the facts relevant to resolve any unfair labor practice. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). See *Laborers Inter. Union of N.A.*, 331 NLRB 259, 260 (2000). An arbitrator's award is "clearly repugnant" to the Act if it is "palpably wrong," in that it is not susceptible to any interpretation consistent with the Act. *Olin Corp.*, 268 NLRB at 574.

There is no dispute that the arbitration proceedings were fair and regular, and the parties agreed to be bound. What is in dispute is whether the contractual issue was factually parallel to the unfair labor practice issue, whether Arbitrator Kagel was presented generally with the facts relevant to resolving the unfair labor practice, and whether Arbitrator Kagel's decision was clearly repugnant to the Act.

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1. The Contractual Issues Before the Arbitrator Were Not Factually Parallel to the Statutory Issues and the Arbitrator was not Presented with Facts Generally Relevant to the Resolution of the Statutory Issues. [Exceptions Nos. 1-7, 9-17, 21-22, 24-25]

Deferral is inappropriate where the contractual issue before the arbitrator is not be factually parallel to the unfair labor practice issue and the arbitrator was not presented generally with the facts relevant to resolve the unfair labor practice. See *Olin Corp.*, 268 NLRB at 574. "One way that this burden can be met is by showing that the arbitrator did not adequately consider issues relevant to the Act." *Heartland Health Care Center*, 359 NLRB No. 155, slip op. at *11 (2013), reaffd. 362 NLRB No. 3 (2015) (citing *Airborne Freight Corp.,* 343 NLRB 580, 580 (2004)). Here, the arbitrator explicitly recognized the limits on his jurisdiction and specifically avoided the statutory issues.

In a unilateral action case, the unfair labor practice issues are not factually parallel to the arbitrator's decision where the arbitrator only considers whether the parties' agreement affirmatively prohibit the employer's unilateral action. *Kohler Mix Specialties,* 332 NLRB 630, 631 (2000). An arbitrator's conclusion that the conduct alleged in a unilateral action charge was not contractually prohibited is "neither conclusive of the statutory issue … nor inconsistent with a finding that the Respondent had breached its statutory duty to bargain." *Armour & Co.*, 280 NLRB 824, fn. 2 (1986). Rather, the resolution of an 8(a)(5) issue "requires a determination of whether the decision is a mandatory subject of bargaining, whether the Union has waived a statutory right to bargain about the decision or its effects, and whether the Respondent has already satisfied its obligation, if any, to bargain." *Kohler Mix Specialties,* 332 NLRB at 631.

For example, the Board in *Haddon Craftsmen*, declined to defer an 8(a)(5) matter to the arbitrator's decision, finding it significant that the arbitrator failed to consider whether the Respondent failed in its obligation to provide notice and an opportunity to bargain over a

proposed change in terms and conditions of employment. 300 NLRB 789, 791, n. 5 (1990).

In *Heartland Health Care*, the Board rejected the employer's contention that deferral to an arbitrator's award was appropriate under the *Olin* post-arbitral deferral standard in an unfair labor practice charge alleging that the employer violated Section 8(a)(5) and (1) by unilaterally reducing the hours of dietary department employee without providing notice and opportunity to bargain over the effects of this conduct. 359 NLRB No. 155, slip op. at *11. Closely overlapping with the facts of the unfair labor practice charge, the sole issue before the arbitrator was a contractual interpretation question of whether a management rights provision was violated when the employer reduced the working hours of the full-time dietary department employees. *Id.* at *8. The ALJ, whose reasoning the Board adopted, found that the evidence necessary to resolve the unfair labor practice was not the same evidence presented to, and considered by, the arbitrator. *Id.* at *11. The ALJ found that the issue of effects bargaining was not raised either at the arbitration hearing or in the parties' posthearing briefs, and nothing whatsoever in the arbitrator's award purported to address effects bargaining, let alone any kind of bargaining. *Id.*

The factual questions relevant to the contractual question before Arbitrator Kagel and statutory issues of the unfair labor practice charge both arose from the so-called "restructuring" of the Respondent's nursing department on November 13, 2013. The restructuring encompassed the Respondent's decision to (1) eliminate the Charge Nurses classification, (2) eliminate 52 individual Charge Nurses jobs as a result of the elimination of the Charge Nurse classification, (3) create a new Department Supervisor position outside of the bargaining unit, and (4) transfer work formerly performed by the eliminated Charge Nurses to new Department Supervisors. The Union never disputed whether the Respondent could by contract or statute create the managerial Department Supervisor position.

Even as to the contractual issue, the ALJ's description is inaccurate. The dispute at

arbitration was not whether the decision announced on November 13, 2013 was a "layoff" or a "restructuring." The issue to be determined at arbitration was whether the method eliminating the 52 individual Charge Nurses positions was prohibited by the layoff article of the collective bargaining agreement. Arbitrator Kagel stated that only this narrow issue of interpreting the layoff article of the parties' contract was before him. Importantly, as noted in the arbitration decision, the Union and the Respondent also stipulated that the issue before the Arbitrator Kagel was confined to the interpretation of the contract and that the separate unfair labor practice issues were not before the arbitration. (CPX 1:12; RX 5:12) In other words, the parties agreed that Arbitrator Kagel would not be resolving the unfair practice charge issues, including related to decisional or effects bargaining.

The separate issues to be determined in the unfair labor practice case are: (1) whether the Respondent unilaterally transferred the unit work of Charge Nurses to non-unit Department Supervisors without meeting its bargaining obligation under the Act and (2) whether the Respondent implemented a mid-term modification of the scope of the bargaining unit through the elimination of the Charge Nurse classification without bargaining in good faith. Two other contractual provisions—the Recognition article and the Management Rights clause on utilization of non-unit employees for unit work—were implicated in the unfair labor practice charge but were not presented to or analyzed by the arbitrator.[4]

Arbitrator Kagel did not determine, as required under *Kohler Mix Specialties*, whether the decision to transfer the Charge Nurse duties to Department Supervisors is a mandatory subject of bargaining, whether the Union waived its statutory right to bargain about the decision or the effects, and whether the Respondent has satisfied its obligation, if any, to bargain. The arbitrator's decision mentions decisional and effects bargaining only for the purpose of

[4] As discussed below, the unfair labor practice charge does not turn on the interpretation of these two provisions.

emphasizing that those issues were not before him. Although events related to the question of decisional and effects bargaining were raised at arbitration, Arbitrator Kagel was quick to clarify that the presentation of these facts related only to the sequence and timing of the alleged layoff. Finally, as observed by the ALJ, the Union did not rely on or analyze the utilization provision of the Management Rights article in its post-arbitral briefing. (ALJD 3) In short, Arbitrator Kagel narrowly limited the presentation of facts regarding bargaining such that he was not presented with facts generally relevant to nor did he make determinations required under Board law to resolve whether Respondent met its statutory bargaining duties.

The three cases cited in the ALJ's decision in support of her finding that the arbitral and statutory issues are factually parallel here are distinguishable. In *Reichhold Chemicals,* 275 NLRB 1414, 1416 (1985), the union specifically argued at the arbitration hearing that the employer's unilateral promotion of the three "chief operators" from the bargaining unit into non-unit "shift supervisor" positions violated the contract's recognition clause because their work belonged in the unit. Here, although the Recognition clause was initially listed in the grievance, the parties later stipulated that only the question of whether the Respondent's conduct violated the layoff article was before the arbitrator. Moreover, the arbitrator in *Reichhold Chemicals* explicitly concluded that "neither the Company's failure to bargain with the Union about the work transfer nor the transfer itself violated the parties' agreement." *Id.* at 1415. By contrast, the arbitrator here repeatedly stated that decisional and effects bargaining issues were not before him; nor was factual evidence presented that would have allowed him to reach any determination on these statutory issues.

Similarly, *Badger Meter*, 272 NLRB 824, 826 (1984), is distinguishable because the actual question before the arbitrator there was whether the transfer of unit work and subtracting was a violation of the parties' contract, and because ample evidence of the parties' contracts,

bargaining history, and past practice was presented to the arbitrator. Whether the Respondent here satisfied its bargaining obligation or whether the right to bargain was waived was never presented to Arbitrator Kagel. Facts regarding the Respondent's notice to the Union of the decision to eliminate the Charge Nurse position and to transfer their duties to the newly created Department Supervisor position were never presented at arbitration. Neither was the non-unit utilization provision of the Management Rights article presented to or analyzed by Arbitrator Kagel.

The last case referenced by the ALJ, *Bay Shipbuilding Corp.,* 251 NLRB 809, 810 (1980), is also not applicable here. In that case, the dispute required that the arbitrator interpret the same insurance coverage provision the union alleged in its unfair labor practice charge was being modified mid-term without bargaining. Again, Arbitrator Kagel was not required to interpret and did not interpret the Union's recognition clause in order to resolve the issues before him. Arbitrator Kagel interpreted two contractual provisions in his decision, both of which are irrelevant to the determination of the unfair labor practices issues. He found that the layoff article did not prohibit the Respondent's elimination of the Charge Nurses, and that Article 3.19 of the contract gave the Respondent a right not to fill the Charge Nurse position. Neither interpretation is determinative of the statutory questions of whether a mid-term modification of the scope of the unit was, or whether a transfer of unit work, was permissible. Furthermore, the arbitrator did not decide the issue of whether the Respondent was entitled to transfer unit work to non-unit employees mid-term.

The evidence presented at arbitration did not related to the question of whether Respondent met its bargaining obligation. Rather, it related to the question of whether the elimination of the Charge Nurse position resulted in the loss of long-term employment for some of the former Charge Nurses. While limited evidence related to the Department Supervisor was

presented at arbitration, this was merely to investigate whether a disruption had occurred in the patient care duties of other unit members as a result of the elimination of the Charge Nurses.

Significantly, Arbitrator Kagel did not consider a comparison of all of the job duties of the new Department Supervisor position to all of the job duties of the former Charge Nurse position, which is necessary to determine whether the work that was performed by bargaining unit Charge Nurses was transferred to a new non-unit position. He failed to consider the numerous other Charge Nurse duties that the Department Supervisor now performs, which must also be considered here, including making patient assignments, taking admissions and discharges, monitoring unit boards, scheduling, etc. Importantly, evidence of Department Supervisor's actual duties in practice was not considered by the arbitrator nor presented at arbitration. Thus, Arbitrator Kagel made no conclusion, inherent or explicit, that would be determinative of the issue of whether bargaining unit duties were transferred to Department Supervisors.

Likewise, the testimony at arbitration on whether Department Supervisors were permitted to engage in patient care, clinical functions, or to perform "bedside nursing" is not dispositive of the unfair labor practice issue. The Union recognizes that Arbitrator Kagel made a limited statement regarding one Departmental Supervisor duty (that they "perform no Bargaining Unit work with respect to taking patient assignments"). However, this determination, which does not address whether and to what extent Charge Nurses take patient assignments, does not resolve whether or not the multitude of other Charge Nurse duties have been transferred to Department Supervisors.

Key factual issues, such as those regarding Respondent's failure to bargain and the transfer of unit work, to resolve the statutory issues were never presented, discussed, nor analyzed at arbitration or in Arbitrator Kagel's decision. It is also clear from the face of the

arbitration decision that Arbitrator Kagel did not make any conclusions regarding the statutory issues or use statutory principles in deciding the issue presented by the parties. The ALJ's contrary interpretation of the arbitration decision is in error, particularly in light of Arbitrator Kagel's insistent refrain at arbitration and in his decision that the statutory issues of decisional or effects bargaining were not before him. Therefore, the ALJ's finding that the arbitral and unfair labor practice issues are factually parallel must be reversed. As such, if the factual record is incomplete in the Board's view because additional evidence and testimony still need to be presented and examined, the ALJ's dismissal of the case must be reversed and remanded for additional evidence at hearing.

2. The Arbitrator's Decision was Repugnant to the Act with Regard to the Complaint Allegations. [Exceptions Nos. 1, 5-8, 10, 13, 15-20, 23-25]

Even if the Arbitration Decision could somehow be read to address the fundamental statutory issue, which it cannot, the decision is repugnant to the Act with respect to the statutory issues in this case under *Spielberg Mfg., Co.*, such that deferral is inappropriate. 112 NLRB 1080 (1955). The arbitration ruling is palpably wrong and repugnant to the Act because it found no violation, despite evidence which the Respondent does not dispute, that the Respondent completely eliminated all positions within an entire job classification mid-term and boldly asserted in response to the Union's vociferous objection that the action in question involved a "permissive subject" about which the Union was not entitled to bargain.

To be clear, no contractual interpretation is required to resolve the unfair labor practice issues here. Again, only two contractual provisions are implicated in the unfair labor practice charge neither of which require interpretation by an arbitrator. First, the Recognition article plainly includes "charge nurses" as a classification within the bargaining unit. Second, the provision on non-unit employee utilization, as the ALJ observed, is a restatement of the law such

that reclassification or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining requiring good faith bargaining. (ALJD 9) Thus there was no genuine issue of contract interpretation and the expertise of an arbitrator was not required to resolve the unfair labor practice issues.[5] See, e.g., *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 617 (1973).

The arbitrator's decision is in clear contradiction to Board law, which makes a unilateral change in the scope of the unit without the consent of the union unlawful. Thus, it is not susceptible to an interpretation consistent with the Act. "It is well established that 'once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that [position] without first securing the consent of the union or the Board.'" *Wackenhut Corp.*, 345 NLRB 850, 852 (2005) (elimination of unit position and transfer of the relevant duties to non-unit positions was a change in unit scope requiring consent of the union) (quoting *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992)). Accord *Holy Cross Hospital*, 319 NLRB 1361, 1361 fn. 2 (1995) (virtual elimination of a unit position was a change in the scope of the unit requiring the union's consent). Reclassification or transfer of bargaining unit work to managers and supervisors is a mandatory subject of bargaining. See, e.g., *Regal Cinemas, Inc.*, 334 NLRB 304, 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003); *Land O'Lakes, Inc.*, 299 NLRB 982, 986–987 (1990); *Hampton House*, 317 NLRB 1005 (1995).

In *Arizona Electric Power Coop.*, 250 NLRB No. 110 (1980), the Board held that an

[5] The Union alleged in its briefing to the ALJ that contract interpretation was not required to resolve the unfair labor practice charge. The ALJ apparently misconstrued this position to mean that the arbitrator need not interpret the parties' contract to resolve the separate issue before him. Ignoring the fact that contractual issues before the arbitrator diverged from the contract provision implicated in the unfair labor practice charge, the ALJ made an implicit conclusion that the fact that the arbitrator considered the parties' contract at all made deferral appropriate. However, the arbitrator neither considered the Recognition article nor the non-unit utilization provision of the Management Rights clause.

employer violated the Act by removing employees from the bargaining unit even though one of the employees was a statutory supervisor. More recently the Board affirmed in its decision in *Walt Disney World Co.*,[6] that "[i]t is well established that Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer party to an existing collective-bargaining agreement from modifying the terms and conditions set forth in that agreement without the consent of the union." 359 NLRB No. 73 (2013), citing *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). The *Walt Disney* Board continued, "[a]s demonstrated, the Union did not consent to the *elimination of the captain positions*, and the same analysis of Addendum B-5 and Article 5 refutes the Respondent's position that the Union consented to the elimination of the bartender classification." 359 NLRB, slip op. at *8 (Emphasis added).

It is also important to repeat here, as analyzed above, that an arbitrator's determination that alleged unilateral conduct was not contractually prohibited is "neither conclusive of the statutory issue … nor inconsistent with a finding that the Respondent had breached its statutory duty to bargain." *Armour & Co.*, 280 NLRB 824, fn. 2 (1986). Rather, the resolution of an 8(a)(5) issue "requires a determination of whether the decision is a mandatory subject of bargaining, whether the Union has waived a statutory right to bargain about the decision or its effects, and whether the Respondent has already satisfied its obligation, if any, to bargain." *Kohler Mix Specialties,* 332 NLRB at 631. Arbitrator Kagel did not make any of these determinations in his decision.

The Respondent's conduct clearly demonstrates a unilateral action and mid-term modification of the scope of the unit without the Union's consent, let along any good faith

[6] While the precedential value of the Board's *Walt Disney World* decision is currently in doubt in light of *NLRB v. Noel Canning* (2014) 573 U.S. _____, 134 S. Ct. 2550, the result and the reasoning of that decision rest on well established NLRB law as applied to facts that are closely analogous to those of the instant charge.

bargaining, in violation of the Act. Accordingly, the arbitrator's decision was repugnant to the Act to the extent it is seen as deciding the statutory issues in this case, which again the arbitrator explicitly states he is not deciding. Deferral to that decision is therefore inappropriate under the *Olin/Spielberg* standard. The Board should reverse the ALJ's decision to dismiss the Complaint and should remand the matter for proceedings before the ALJ.

B. The Board Should Modify its Deferral Standards in 8(a)(5) Cases. [Exceptions Nos. 26-27]

Although clearly unnecessary for an order of remand to the ALJ, CNA respectfully requests the Board to adopt a new framework in Section 8(a)(5) post-arbitral deferral cases to give greater weight to safeguarding statutory rights in Section 8(a)(5) cases as the Board did in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014). It has been recognized by the General Counsel in its memoranda enunciating the *Collyer* deferral standard in 8(a)(5) cases that "some Section 8(a)(5) charges can implicate individual Section 7 rights or have as serious an economic impact on the Charging Parties as a Section 8(a)(1) and (3) charge." GC Memorandum 12-01, at p. 9 (2012). Although unilateral action charges usually turn on a matter of contract interpretation better left to an arbitrator's skill and expertise, this memorandum suggests that where, as in the instant case, the conduct at issue interferes with Section 7 rights or there is a serious economic impact on bargaining unit members and should be assessed on the same standards as an 8(a)(3) case.

The Respondent's conduct in this case absolutely implicates individual Section 7 rights and had a very serious economic impact on many bargaining unit employees. The unilateral mid-term modification of the scope of the unit abrogated the collective bargaining relationship, effectively redefining the unit that was certified and rewriting bargained for provisions of the parties' agreement. Through its unilateral action the Respondent reduced the unit by over 8%.

Moreover, Respondent's unilateral action resulted in 52 bargaining unit members having to make the difficult choice—whether to forgo their right to collective bargaining, their current rate of pay, or their continued employment. They could apply to be a non-unit Department Supervisor, move into another bargaining unit position without their 6% differential pay, or resign. The "rough justice" standard of the arbitrator with limited jurisdiction was dismissive of the real abrogation of Section 7 rights and economic impact caused by the Respondent's unilateral change. Finding that the mere a net loss of only 14 jobs did not violate the layoff article of the contract, the arbitration in no way addressed the egregious statutory violation that occurred in this case.

Accordingly, the Union asks that the Board adopt the *Babcock & Wilcox* deferral standard in Section 8(a)(5) cases such as this and require that the party urging deferral to demonstrate that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the arbitral award. As is also the case for 8(a)(3) and (1) cases under the *Babcock & Wilcox* standard, the Board should place the burden of this showing should on the party urging deferral. If the party urging deferral makes this showing, only then should deferral be appropriate. This case makes clear that such a standard is appropriate for Section 8(a)(5) cases that go to the heart of the parties' bargaining relationship and with conduct severely impacting employees' statutory rights.

Applying the *Babcock & Wilcox* approach here, the Board should not defer to the arbitrator's decision here. By stipulation of the parties, Arbitrator Kagel was not authorized to decide the unfair labor practice issue. He also expressly stated at arbitration and in his decision that he was not considering the statutory issue. As detailed above, the relevant facts as required by Board law were not presented to or considered by the arbitrator. Finally, as analyzed above

under the *Olin/Spielberg* repugnancy standard, Board law does not reasonably permit the arbitral award.

Under existing Board law and policy and under the *Babcock & Wilcox* standard, deferral to the arbitrator's award is not appropriate here. Thus, the ALJ's decision to dismiss the Complaint should be reversed.

VI. CONCLUSION

The Union respectfully submits that extant Board law and the record demonstrate that deferral of this case to arbitration is inappropriate. Upon the stipulation repeated of the parties, the arbitrator did not possess jurisdiction, was not authorized to, and did not consider the statutory issues alleged in the unfair labor practice charge. The arbitral and statutory issues were not factually parallel, and the factual issues relevant to resolving the unilateral change issues were not presented to and were not determined by the arbitrator. Finally, with regard to the Complaint allegations, the arbitrator's award was repugnant to the Act such that the Board cannot grant it deference. The Board should reverse the ALJ's dismissal of the Complaint, and the case should be remanded to the ALJ for consideration on its merits necessary to decide the statutory issues.

DATED: December 14, 2015

Respectfully submitted,

Carmen Comsti
Counsel for Charging Party CNA

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Oakland, California 94612.

On the date below, I served a true copy of the following document:

EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE MARY M. CRACRAFT'S NOVEMBER 16, 2015, DECISION, FILED BY CALIFORNIA NURSES ASSOCIATION'S

BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE MARY M. CRACRAFT'S NOVEMBER 16, 2015, DECISION, FILED BY CALIFORNIA NURSES ASSOCIATION'S

Case 31-CA-117462

via Electronic Mail as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: December 14, 2015

Carmen Comsti